



**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

The Board has previously held that claimant gave timely notice of a work-related accident and that claimant sustained a work-related injury to her back. However, benefits were denied because the record did not establish whether claimant's injury was temporary or permanent. Furthermore, claimant had failed to prove that her subsequent need for back surgery was due to the work-related back injury. Claimant responded to the Board's finding that she failed to establish a direct connection between her work that ended November 11, 2001, and her surgery in June of 2002, at the third preliminary hearing held on July 10, 2003. Claimant presented the medical records of two physicians and depositions of co-workers. A letter dated November 19, 2002, from Dr. Robert L. Eyster, claimant's treating physician, and a December 2002 independent medical examination performed by Dr. Pedro A. Murati, both related a history as told to them by the claimant. Neither physician expressed his personal medical opinion that the claimant's need for surgery was more probably than not caused by or directly attributable to an injury at her work.

Furthermore, the Board found that "the testimony of claimant's five co-workers does not support her assertion that her former job with respondent required frequent standing and bending at the waist. The five co-workers testified that they stood from three to five times per day for five to fifteen minutes. None of the five co-workers corroborated the claimant's allegation of prolonged standing and frequent bending at work."<sup>1</sup>

Thereafter, claimant's counsel presented to Dr. Eyster the above description of claimant's job duties according to claimant's co-workers. Based on that description, together with claimant's assertion that she was not experiencing back pain prior to her work activities for respondent, Dr. Eyster opined that claimant's surgery was directly attributable to the work-related injury or aggravation.<sup>2</sup> Judge Clark again found that "Dr. Eyster's latest opinion is based on a history given by the [c]laimant."<sup>3</sup>

The Board disagrees and finds from the record as it now stands that it is more probably true than not true that claimant's need for back surgery was due to a back injury that arose out of and in the course of her employment with respondent. Consequently, the Board must reverse the basis for the ALJ's denial of claimant's request for preliminary benefits. However, it has been over two (2) years since claimant's surgery. It seems likely that by now she has reached maximum medical improvement and that this case is ready for a regular hearing and final award. If so, claimant may not be in need of ongoing preliminary hearing benefits such as additional medical treatment and would not be entitled to temporary total disability compensation. Furthermore, payment of past compensation

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<sup>1</sup> Appeals Board's Order at 3 (Sept. 19, 2003).

<sup>2</sup> P.H. Trans. (April 29, 2004), Cl. Ex. 1.

<sup>3</sup> ALJ Order (April 29, 2004).

may best be addressed after the record is complete. In any event, that is a decision for the ALJ.

**WHEREFORE**, Administrative Law Judge John D. Clark's preliminary hearing Order dated April 29, 2004 is reversed and remanded for a determination of claimant's present need for preliminary benefits.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of December 2004.

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BOARD MEMBER

c: Roger A. Riedmiller, Attorney for Claimant  
Anton C. Andersen, Attorney for Respondent and Zurich Ins. Co.  
John D. Clark, Administrative Law Judge  
Paula S. Greathouse, Workers Compensation Director